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91-1623

Supreme Court, U.S.
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Case No.:_____

IN THE UNITED STATES SUPREME COURT

October Term

WILLIAM CHADWICK GIBBS AND
RUTH HAND GIBBS

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eleventh Circuit

Ruth H. Gibbs

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William C. Gibbs

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-A-

## QUESTIONS PRESENTED FOR REVIEW

1. Is the denial of trial by jury, to which citizens accused of tax avoidance, alone, are subjected absent the ability (indisputably lacking in these petitioners) of depositing an amount equal to the sum claimed as due: (a) in derogation of their right to trial by jury, and (b) an invidious classification violative of their due process and equal protection entitlements ?*

2. Is not the Appellate Court in error in upholding the District Court's judgment, arrived by using the doctrine of res judicata; where the court of origin has made no judgment but only a decision and where such court is not an inferior court as provided by Art. III, Sections 1 and 2 ?

*The issue is wholly ignored in the opinion of the appellate court below, notwithstanding that thousands of citizens are subjected every year to this disability, to which each of us is potentially liable !

# CERTIFICATE OF INTERESTED PERSONS

Hon. William M. Acker, Jr.

William A. Roberts, Esq.

U.S. Justice Dept.

William Chadwick Gibbs

Ruth Hand Gibbs

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## GROUNDS OF JURISDICTION

The opinion below was entered 8 October, 1991. Application for Rehearing was timely filed, and denied 10 December 1991. This Court has cognizance of this petition by force of 28 USC 1254.

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## CONSTITUTIONAL PROVISIONS CONCERNED

The Fifth Amendment of the United States Constitution, prohibiting deprivation of property without due process of law and importing equal protection of the laws, is violated by the combined operation of 28 USC 1346(a)(1) and 28 USC 2402, limiting the availability of a jury to actions "against the United States" and so requiring untold numbers of citizens to pay into court such sums as the IRS may choose to claim, thus depriving them of the jury trial to which they would have been entitled but for the lack of means.

-G-

## FACTS MATERIAL TO CONSIDERATION OF QUESTION PRESENTED

-G- [Continued]

Citizens accused of tax avoidance are routinely allowed a jury trial -- provided they are sufficiently wealthy to deposit into court whatever sum it is that the IRS may choose to claim of them. Petitioners, indisputably, lacked the money, in consequence whereof, they were denied the jury trial to which others similarly situated are entitled.

-H-

STATEMENT OF THE CASE

Petitioners were represented in the Tax Court nominally, only. In violation of the terms of their representation and contrary to his express promise, their counsel failed to appear and judgment was entered against them in the sum of many hundreds of thousands of dollars, far in excess of their ability to pay.

We were double-taxed; denied the homestead exemption for by United States v. Rodgers, 461 U.S. 677, 103 S. Ct. 2123, 76 L. Ed.2d 236 (1983); and wrongfully penalized --- our assertion of all of which being admitted in the opinion below (p.6 )

-H- [continued]

We then proceeded in the District Court pro se but, owing to our not being conversant with the rules of procedure we were some seven days late in opposing a motion for summary judgment. We did, however, present in the District Court the issue stated above, in the form of a motion for reconsideration. It was denied by the District Court.

The issue has thereafter consistently been urged at all stages in these proceedings: in our principal brief on appeal in the appellate court; in our reply brief there; and in our application for reconsideration.

-I-

FEDERAL JURISDICTION

The Petitioners were impled under 28 USC 1340 and 1345, and 26 USC 7402.

-J-

ARGUMENTS IN SUPPORT OF ALLOWANCE OF WRIT

Every American taxpayer is potentially subject

to claimed tax liability in excess of his ability to deposit into court. That this ability, where it is present, buys a jury trial and, where it is lacking denies it is an outrage. Equal access to a due process right so funda mental ought not to be made to depend on financial means. Least of all should the United States make it so depend!

Due process requires that legislation and regulation have a real and substantial relation to permissible governmental objectives. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1936). And the classification of citizens by statute must not be arbitrary. Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 1821, 37 L.Ed.2d 782 (1973). If classifications are not to offend the equal protection of the laws, they must be reasonable, resting on some ground of difference having a reasonable relation to the subject-matter of the legislation. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

The classification of citizens in impeding or denying jury access according to whether they are accused of tax avoidance is additionally invalid in that (1) all similarly situated are not treated alike, Staunton v. Staunton, 421 U.S. 7, 95 S.Ctl. 1373, 43 L.Ed.2d 688 (1975); Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed2d 31 (1977), and (2) because the ability to satisfy the requirement of paying the alleged claim into court as a pre-requisite to what is otherwise a freely available jury entitlement is clearly dependent upon wealth, a suspect classificati on. 16A Am.Jur. 2d "Constitutional Law," sec 750.

Because jury entitlement is a fundamental right --- so fundamental a right that it is treated not only in Art. III, but also in the Sixth and Seventh Amendments to the United States Constitution --- the classification is to be tested by the stricter requirement that it serve a "compelling governmental interest" (as well as be the "least restrictive means" available in the premises). San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973),

Dunn v. Blaustein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed 2d 274 (1972).

What interest ?

What governmental interest is served in, first, singling out citizens accused of tax avoidance for unique disability in respect to their jury entitlement and, then, converting that disability into an impossibility where the citizen lacks the economic means of surmounting the hurdle so injuriously imposed ? Isn't this what the Constitution exists to prevent ?

The teaching of this honorable court is that it most certainly is. This Court has determined that where a lack of means results in deprivation of a fundamental right, there is preeminently constitutional violation inflicted. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed2d 341 (1974). The nominal and, for my wife and I, purely illusory existence of a jury entitlement is as lacking in "meaningfullness" (Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) and as "futile" a "gesture" (Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)

as is the admonition, "[B]e ye warmed and filled," to the starving and destitute. James 3:16.

## STATEMENT OF CASE RE 2ND QUESTION

A Tax Court, as a creature of Executive authority, cannot use the vail of res judicata to ensnare constitutionally empowered (Article III) courts. In support, petitioners call the Court's attention to the fact that the I.R.S. is required to reduce a Tax Court decision to judgment in an Art. III court before it can dispose of taxpayer property seized pursuant to a Tax Court decision. It is therefore self evident, that the Tax Court has not been given the authority by Congress to render judgments (only decisions); hence, the doctrine of res judicata does not apply.

The appellate court (p - 4) upheld the District Court's mis-perception of the Tax Court's standing---the issue of Executive and Judicial powers were impermissibly merged, and further stated (p - 5)that: "A prior judgment will bar an action on the principle of res judicata if the parties were identical in both suits,

the prior judgment was rendered by a court of competent jurisdiction. . . . " The Tax Court did not render a judgment but a decision and further it was not rendered by a court of competent jurisdiction, being an administrative court operated by the Executive Branch of government, a concept wholly foreign to our founders view of the separation of the three branches of government. James Madison, considered the father of the constitution, wrote: "The accumulation of all power ---legislative, executive & judiciary---in the same hands, may justly be pronounced the very definition of tyranny".

WHEREFORE, petitioners now pray that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit in this matter.

Respectfully submitted

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7757 & 90-7689

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

WILLIAM CHADWICK GIBBS
RUTH HAND GIBBS,

Defendants-Appellants

On Appeal from the United States District Court for the Northern Dist. of Alabama

ON PETITION FOR REHEARING
( December 10, 1991 )

BEFORE:

PER CURIAM:

The petition(s) for rehearing filed by William Chadwick Gibbs and Ruth Hand Gibbs is denied.

ENTERED FOR THE COURT:

Signed by Judge Fay
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 89-7757 & 90-7689
Non-Argument Calendar

D. C. Docket No. CV-89-AR-0103-M

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

WILLIAM CHADWICK GIBBS,
RUTH HAND GIBBS,

Defendants-Appellants

Appeals from the United States District
Court for the Northern Dist. of Alabama

(October 8, 1991)

Before Fay, Edmondson and Cox,Circuit Judges

PER CURIAM:

This is a collection action brought by the United States to obtain a judgment against William Chadwick Gibbs and Ruth Hand Gibbs for tax liabilities already determined in a prior assessment and tax court hearing. After taxpayers answered the complaint by denying liability for the underlying assessment, the government moved for summary judgment on the grounds that the underlying liability for the assessments had already been determined in the prior proceedings and that the taxpayers were barred by res judicata from relitigating the issue. The district court granted the governments motion after the taxpayers failed to respond, and the government then submitted an affidavit showing the current amount owed by the taxpayers once interest and penalties had been added to the original assessment. Based on this affidavit, the court granted judgment to the government and the taxpayers appealed (Appeal No. 89-7757). The government later moved that the court amend its former judgment because the court made a clerical error regarding the amount of William Chadwick Gibbs' tax liability. The court granted this motion, and the taxpayers appealled from this ruling

as well. (Appeal No. 90-7689).

Summary Judgment (No. 89-7757)

On appeal, the taxpayers continue to challenge the underlying determination of the amount of their tax liability, despite the fact this determination was already made in their prior tax court action. Their only argument against the judgment in the present action, which merely determined their current liability after penalties and interest, centers around their contention that they should have been given time to secure counsel before summary judgment was granted against them. The government correct responds that the prior tax court determination served as res judicata on the issue of liability for the tax due, and that the district court properly granted partial summary judgment on the liability issues. The government further argues that, in any event, each of the taxpayers' arguments challenging the validity of this prior determination are frivolous.

This action was simply a collection action brought by the government to obtain a judgment after the taxpayers' tax liability had already been determined by the tax court. See 26 U.S.C. §7402(a). A prior

judgment will bar an action on the principle of res judicata if the parties were identical in both suits, the prior judgment was rendered by a court of competent jurisdiction, there was a final judgment on the merits and the same cause of action was involved in both cases. Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979). The doctrine of res judicata applies in tax cases so that "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same year." Commissioner v Sunnen, 333 U.S. 591, 598, 68 S.Ct. 715, 719-20 (1948). A district court's determination that certain claims are barred by res judicata is reviewed for an abuse of discretion. Greenblatt v Drexel Burnham Lambert, inc., 763 F.2d 1352, 1360 (11th Cir. 1985). Because the identical parties already litigated the taxpayers' liability before the tax court (see R. Tab 9 at Exhibits), which liability was affirmed by this Court (see Gibbs v Commissioner, No. 86-7378, slip op. (11th Cir. October 14, 1986) (unpublished opinion), the district court did not abuse its

discretion in holding that the question of liability was barred by res judicata.

The only task which remained in the present action was the calculation of the current amount of tax liability with the added interest and penalties from the time the tax court first determined the amount owed. The taxpayers did not introduce any defense to these calculations absent their challenges to the underlying liabilities for certain tax years. For example, they argue that they were taxed twice for the proceeds of a real estate sale, and that they were entitled to a homestead exemption which was not taken into account, and that the tax court wrongfully imposed a penalty against them. However, they never argue that the penalties or interest calculated by the government was incorrect, even though this is the only issue in the current action. Therefore the court's grant of judgment against them was proper.

The taxpayers' argument that the court should not have granted summary judgment against them until they had an opportunity to obtain counsel is meritless. The taxpayers did not inform the court of their intent-

ion to retain counsel, nor did they move for additional time to respond to the summary judgment motion, until 25 days after the government's motion was filed, and one week after the district court granted the government's motion. Although this court will give some leeway to pro se litigants on substantive matters, pro se litigants are still required to conform to the procedural rules. See Brooks v. Britton, 669 F.2d 665, 667 (11th Cir. 1982) (pro se litigants required to timely move for extension of time in order to file a late notice of appeal).

The grant of summary judgment is affirmed.

The 60(a) Motion (No. 90-7689)

On appeal the taxpayers argue that it was not fair for the district court to grant the government's post-trial motion to correct the judgment while it summarily denied the taxpayers' motions to alter the judgment on the merits. The government points out that the district court made a clerical error in determining the amount owed by one of the taxpayers, and that the district court acted well within its bounds in correcting the error on limited remand from this court.

When the case was before this court on appeal, the government moved that the judgment be corrected based on the fact that the district court had made a clerical error regarding the amount of tax owed by William Chadwick Gibbs. This court made a limited remand to allow the district court to correct the judgment, which it did. A district court's decision to correct a judgment is reviewed for an abuse of discretion. See Gulf Coast Fans v. Midwest Elec. Importers, Inc., 740 F.2d 1499, 1520 (11th Cir. 1984).

The taxpayers' argument that the district court should have reconsidered the merits of the entire case when it was remanded is frivolous. This Court only remanded the case for the limited purpose of allowing the district court to correct the clerical error in the judgment. This type of correction is clearly permitted by Rule 60, which provides that clerical mistakes in the judgment can be corrected at any time. Fed.R.Civ. 60(a). It is apparent that the district court, when it originally calculated the amounts owed by the taxpayers, misread the affidavit submitted by the government and inadvertently only entered judgment against William

Chadwick Gibbs for the amount he owed for 1979, and omitted the amounts owed for previous years.The court's decision to correct this error was clearly not an abuse of discretion.

Sanctions (No. 90-7689)

The government argues on appeal that it should be entitled to recover $1,500 for the estimated costs of this appeal in order to sanction the taxpayers for filing a frivolous appeal. The government points out that none of the taxpayers' arguments on appeal contained any merit, and that their tax liability had already been determined twice in prior proceedings. The taxpayers do not respond to this request.

When an appeal is frivolous, this Court may award damages and single or double costs to the opposing party. Fed.R.App.P. 38. Sanctions are particularly appropriate when the contentions have already been brought and settled. McNair v. Eggers, 788 F.2d 1509, 1510 (112th Cir. 1986). This Court has held that an award of $1,500 in frivolous tax appeals is appropriate in lieu of remanding a case for determination of costs

and attorneys fees. See Pollard v. Commissione, 816 F.2d 603, 605 (11th Cir. 1987). The taxpayers in this case have already twice challenged the tax court's adjudication of liability before this Court, and have twic e been unsuccessful. We find that under these circumstances sanctions in the amount of $1,500 are appropriate.

## Motion for Stay

After their appeal was filed with this Court, the taxpayers moved to stay the execution of judgment until they have exhausted their federal appeal. Because the underlying appeal is frivolous, the motion for stay is denied.

## Conclusion

The summary judgment is affirmed. The granting of the Rule 60 motion is affirmed. Sanctions in the amount of $1,500 are impos ed against appellants in favor of appellee and the motion for a stay is denied.

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari inclusive of exhibits was duly served upon counsel for all parties to this cause by depositing same in the United States mail first-class, postage prepaid, and directed to the following:

Solicitor General
Dept. of Justice
Washington, D.C. 20530

This the 4th day of March, 1992

William Chadwick Gibbs